Supreme Court, U.S.
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No. 96-656

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, THE HOME BUILDERS ASSOCIATION OF VIRGINIA AND THE HOME BUILDERS ASSOCIATION OF RICHMOND,

Petitioners,

v.

CHESTERFIELD COUNTY, VIRGINIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION IN SUPPORT OF PETITIONERS

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The Building Industry Legal Defense Foundation has received the written consent of the parties to file this brief in support of petitioners, and has filed the letters of consent with the Clerk of this Court.

INTERESTS OF AMICUS CURIAE

The Building Industry Legal Defense ("BILD") Foundation is a not-for-profit corporation organized under the laws of the State of California. The BILD Foundation is a wholly owned subsidiary of the Building Industry Association of Southern California whose 1400 members include a significant number of residential developers and associate businesses that take part in building 70% of all new homes annually in the Southern California region.[1]

The BILD Foundation's interest lies in countering local governments' funding needs with the need for affordable housing. Some communities in California are now demanding fees up to $77,000 per house.[2] Heightened scrutiny applied to such fees would demonstrate to an apprehensive home buyer that the fee paid directly mitigated the impact from the new home. A 10-20% miscalculation could result in

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[1] The BILD Foundation's mission is to "[d]efend the legal rights of home and property owners." The BILD Foundation promotes and supports important legal cases to secure a body of favorable court decisions for its members specifically, and property owners and developers generally.

[2] For example, fees associated with the issuance of a building permit in the City of Solana Beach for a 2,000 square foot, 3 bedroom, 2 bath home valued at $169,000 can cost $77,721 [the following fee schedule is similar in its adoption and application to Chesterfield's Cash Proffer Policy: plan check—$797; building permit—$1,226; MPE permits—$216; seismic—$17; sewer—$4,500; water—$4,761; public facilities—$1,690; parks—$600; fire—$442; elementary school—$8,432 (this amount can run as high as $38,882 for "affordable housing"); high school—$10,590; inclusionary housing—$14,000] excluding fees for engineering, subdivision processing, annual sewer service charges, and adjudicatively imposed fees.

significant savings. According to the National Association of Home Builders, even a $1,000 increase in the purchase price of a home can force 21,000 potential buyers out of the market. *The Truth About Regulations and the Cost of Housing* (NAHB, 1995) p.6.

SUMMARY OF ARGUMENT

The Fourth Circuit Court of Appeals stated that the reduced scrutiny of the standard articulated in *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) should apply in this case rather than the standard articulated in *Dolan v. City of Tigard*, 129 L.Ed. 2d 304 (1994). This determination is based on the principle that the *Agins* standard applies to all land use regulation facial challenges. However, such a principle is in conflict with *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

Agins has generally, yet incorrectly, been applied to facial challenges to land use regulation without regard to any other characteristics of the regulation. On the other hand, *Dolan* has been used in as-applied challenges. However, *Lucas* applied *Agins* to an as-applied challenge. Therefore, the distinction between facial and as-applied challenges is a distinction without a difference. This Court's opinion in *Dolan* should have been sufficient to resolve this confusion. In *Dolan*, this Court distinguished *Agins* by stating that *Agins* should apply to "essentially legislative determinations classifying entire areas of the city" not where "the city made an adjudicative decision to *condition petitioner's application for a building permit* on an individual parcel." Emphasis added. *Dolan*, 129 L.Ed 2d 316. The key distinction is when compliance with the regulation is required, e.g., at the time of adoption or, at the time of issuing a building permit. The application of *Agins* is limited solely to circumstances where the challenged regulation does not require the imposition of a condition on the application for a building permit. For this reason alone, certiorari should be granted.

Certiorari should also be granted to clarify the well-established conflict in various state and federal courts regarding whether the standard articulated in *Dolan v. City of Tigard*, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) applies to legislatively enacted monetary exactions.

It is evident that monetary exactions or fees should be held to the same level of scrutiny as those involving dedications. For if monetary exactions receive less scrutiny, public agencies will simply impose a fee and then use the fee to purchase a possessory interest or construct a public improvement for which they would have otherwise been required to pay. The law does not permit public agencies to do indirectly what it does not permit directly.

Additionally, there remains a heightened risk of extortion for legislative acts imposing a fee because no notice is required to be given to the fee payor at the time the fee is legislatively adopted. Furthermore, legislative acts do not enjoy absolute deference. The Constitution applies equally to legislative as well as adjudicative acts.

ARGUMENT

A. CERTIORARI SHOULD BE GRANTED TO CRYSTALLIZE THE APPLICATION OF *AGINS* TO REGULATIONS WHICH REQUIRE COMPLIANCE AT THE TIME OF ADOPTION RATHER THAN THE TIME OF ISSUING A BUILDING PERMIT

There is much confusion among land use practitioners and the courts regarding when the standard elicited in *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) is applicable. That standard states that a land use regulation does not affect a taking if it "substantially advances legitimate state interests" and does not "deny an owner economically viable use of his land." *Agins, supra*, 447 U.S. 260.

In essence, some believe that the *Agins* standard applies to facial challenges, whereas *Dolan v. City of Tigard,* 129 L.Ed. 2d 304 (1994) applies to as-applied challenges. However, as we shall see, this Court's decision in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992) is in conflict with such a rule. To understand this problem, let us first look to *Agins.*

There can be no doubt that the *Agins* standard applies to facts which are similar to *Agins.* The plaintiffs in *Agins* brought a challenge to the zoning ordinances which were placed on plaintiffs' property. *Agins,* 447 U.S. 257. These ordinances limited the use of their property to 1 to 5 dwelling units. *Id.* The ordinances were effective immediately upon passage and did not require an application for a building permit to trigger their effect. *Id.* Indeed the plaintiffs "never sought approval of their land under the zoning ordinances." *Id.*

The plaintiffs challenge was classified as a facial challenge to the ordinances. *Agins,* 447 U.S. 259. It is the overemphasis of this characterization which has led to so much confusion. A facial challenge seeks to overturn the legislative act or provision in its entirety, regardless of how it is applied to specific situations, or in this context, to specific parcels of land. A successful facial challenge must show that there are no circumstances upon which the challenged provision can be legitimately applied. *United States v. Salerno,* 481 U.S. 739, 745 (1987); *Reno v. Flores,* 507 U.S. 292, 300 (1991)

By contrast, *Lucas,* which did not involve a facial challenge but rather challenged the application of South Carolina's Beachfront Management Act to Mr. Lucas' property, also applied the *Agins* standard. *Lucas,* 505 U.S. 1003, 1007-8, 1016. Therefore, since *Agins* was applied to an as-applied as well as facial challenge, it would seem that the crucial distinction regarding the applicability of the *Agins* standard is not whether the type of challenge.

This Court in *Dolan v. City of Tigard,* 129 L.Ed. 2d 304 (1994), shed some light on the applicability of the *Agins* standard. This Court distinguished *Agins* by stating that *Agins* "involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to *condition petitioner's application for a building permit* on an individual parcel." Emphasis added. *Dolan,* 129 L.Ed 2d 316.

As discussed below, the formalistic distinction as to whether the agency charged with responsibility for making land use decisions is acting in a legislative or adjudicative capacity is a distinction without a difference.

The only way to reconcile *Lucas* with *Agins* and *Dolan* is to look to *when compliance with the regulation is required.* If the time for compliance is effective immediately upon its adoption, as is the case with zoning ordinances which limit the use of property, then *Agins* applies. However, if compliance is delayed until, and triggered by, an application for a land use or building permit, then *Dolan* should apply. It is in the latter situation that there is a heightened risk of extortion. *See, Nollan v. California Coastal Commission,* 483 U.S. 825, 837.

It cannot be overemphasized that *Agins* does not apply to regulations which require the imposition of a condition upon a building permit application. The regulation challenged in *Dolan* was the conditioning of a building permit. Yet this Court specifically stated that if *Agins* did apply, Ms. Dolan would have lost. The conditions at issue in *Dolan* did not deprive Ms. Dolan of all economically viable use of her property (*Dolan, supra,* 129 L.Ed 2d 316, fn. 6) and the conditions substantially advanced a legitimate governmental interest (*Dolan, supra,* 129 L.Ed 2d 318).

Chesterfield County's Cash Proffer Policy requires that a "[p]ayment of the cash proffer must occur prior to or at the time of building permit application." Cash Proffer Adopted

Policy B.5. Therefore, *Dolan* should apply regardless of whether the Policy is challenged on its face or as-applied.

B. CERTIORARI SHOULD BE GRANTED TO RESOLVE IMPORTANT ISSUES AS TO WHICH THERE IS A WELL-ESTABLISHED CONFLICT IN BOTH STATE AND FEDERAL COURTS

1. State And Federal Courts Are Split As To Whether *Dolan* Applies To Monetary Exactions In Addition To Those Involving Dedications.

There is a well-developed split as to whether *Dolan* extends heightened scrutiny solely to permit conditions that require the dedication of real property and the concomitant loss of the right to exclude, or whether *Dolan* applies to monetary exactions as well.

Courts that have applied, or suggested the appropriateness of applying, a heightened scrutiny to development fees include state cases such as *Ehrlich v. City of Culver City,* 911 P.2d 429 (1996), *cert. denied,* 1996 U.S. LEXIS 6172, *Northern Illinois Home Builders Association, Inc. v. County of Du Page,* 649 N.E.2d 384 (Ill. 1995); *Home Builders Association of Central Arizona v. City of Scottsdale,* 902 P.2d 1347 (Ariz. 1995); *Clark v. City of Albany,* 904 P.2d 185 (Or. 1995); *Trimen Development Company v. King County,* 877 P.2d 187 (Wash. 1994); *College Station v. Turtle Rock,* 680 S.W.2d 802 (Tex. 1984); *Collis v. Bloomington,* 246 N.W.2d 19 (1976); *Jenad, Inc. v. Scarsdale,* 218 N.E.2d 673 (N.Y. 1966), and *Remmenga v. California Coastal Comm'n,* 163 Cal.App.3d 623, 628 (1985). At least one federal case has suggested that *Dolan* is relevant in assessing impact fees. *City of Portsmouth v. Schlesinger,* 57 F.3d 12 (1st Cir. 1995) (relying in part on *Dolan* to strike down an affordable housing impact fee).

On the other side, some state courts have limited *Dolan's* applicability to dedications, or suggested as much. *McCarthy v. City of Leawood,* 894 P.2d 836 (Kan. 1995);

Waters Landing Limited Partnership v. Montgomery County, 650 A.2d 712 (Md. 1994); *Blue Jeans Equities West v. City and County of San Francisco,* 221 Cal.App.3d 1072 (1992). So too have some federal courts. *Clajon Production Corp. v. Petera,* 70 F.3d 1566 (10th Cir. 1995); *Commercial Builders v. City of Sacramento,* 941 F.2d 872 (9th Cir. 1991); *Garneau v. City of Seattle,* 897 F.Supp. 1318 (W.D. Wash. 1995).

2. State And Federal Courts Are Split As To Whether *Dolan* Applies To Legislative Actions.

A number of state courts have seized on Justice Rehnquist's notation[3] that the exaction in *Dolan* was imposed on a building permit—issuance of which is an "adjudicative" act—to find that heightened scrutiny does not apply to exactions imposed on building permits pursuant to ordinances of general application. *See Ehrlich, supra; Loyola Marymount Univ. v. Los Angeles Unified School District,* 45 Cal.App.4th 1256 (1996); *Home Builders Association of Central Arizona v. City of Scottsdale,* 902 P.2d 1347 (Ariz. 1995); *Southeast Cass Water Resource District v. Burlington Northern Railroad Co.,* 527 N.W.2d 884 (N.D. 1995); *Waters Landing Limited Partnership v. Montgomery County,* 650 A.2d 712 (Md. 1995); *Parking Association of Georgia v. City of Atlanta,* 450 S.E.2d 200 (Ga. 1994) *cert. denied, 115 S.Ct. 2268 (1995); Arcadia Development Corp. v. City of Bloomington,* 552 N.W.2d 281 (1996); *San Mateo Coastal Landowners' Association v. County of San Mateo,* 38 Cal.App.4th 523 (1995). So too has at least one federal court. *Harris v. City of Wichita,* 862 F.Supp. 287 (D. Kan.1994).

Other state courts have held that exactions legislatively imposed pursuant to ordinances of general applicability are subject to *Dolan's* heightened scrutiny. *Art Piculell Group v. Clackamas County,* 922 P.2d 1227 (1996); *J.C. Reeves Corp. v. Clackamas County,* 887 P.2d 360 (Or. 1994); *Schultz v. City of Grants Pass,* 884 P.2d 569 (Or. 1994); *Northern Illinois Home*

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[3] *Dolan, supra,* 114 S.Ct. at 2316, fn. 8.

Builders Association, Inc. v. County of Du Page, 649 N.E.2d 384 (Ill. 1995); *Trimen Development Company v. King County,* 877 P.2d 187 (Wash. 1994) [A county ordinance requiring developers seeking to build housing either dedicate land for public parks or pay a fee must meet *Dolan*'s "rough proportionality" test]. Justice Mosk's concurring opinion in *Ehrlich* stated that "even generally applicable laws which authorize the physical occupation of the property are takings. . . ." *Ehrlich, supra,* 911 P.2d at 460, n.4.

Federal courts have also held that *Dolan's* heightened scrutiny applies to legislatively imposed fees. *Manocherian v. Lennox Hill Hospital,* 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied* 115 S.Ct. 1961, 115 S.Ct. 1962 (1995); *Amoco Oil Co. v. Village of Shaumburg,* 661 N.E.2d 380 (1995).

Two members of this Court are on record as supporting granting certiorari to address this issue. In dissenting from the denial of a writ of certiorari the Justices stated:

> It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distraction without a constitutional difference.

Parking Association of Georgia, Inc. v. City of Atlanta, Georgia 115 S. Ct. 2268 (1995)(Thomas, J. and O'Connor, J. dissenting).

C. *DOLAN* APPLIES TO MONETARY EXACTIONS

The Supreme Court's decision in *Dolan* itself strongly suggests that the rough proportionality standard is applicable to monetary exactions. Several of the cases relied upon by this Court in arriving at the rough proportionality standard in *Dolan* involved takings challenges to fees.[4] *E.g., Jordan v. Village of Menomonee Falls,* 137 N.W.2d 442 (Wis. 1965); *Collis v. Bloomington,* 246 N.W.2d 19 (Minn. 1976); *College Station v. Turtle Rock,* 680 S.W. 2d 802, (1984); *Jenad, Inc. v. Scarsdale,* 218 N.E.2d 673 (N.Y. 1966).

In addition, courts, like legislatures, do not engage in idle acts. This Court's decision in *Ehrlich v. Culver City,* 114 S. Ct. 2731 (1994) to vacate and remand the Court of Appeal's original decision was a clear signal that the principles set forth in *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987), and *Dolan* apply to monetary exactions.[5] As the Arizona Court of Appeals stated in *Home Builders Association of Central Arizona v. City of Scottsdale,* 902 P.2d 1347, 1352 (1995), "we agree that the *Ehrlich* remand implies that a monetary fee is subject both to a takings analysis, and . . . to a *Dolan* analysis."

Common sense supports this position. As an initial matter, it is difficult to conceive of a justification for subjecting impact fees to a lesser degree of scrutiny than dedication

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[4] Justice Stevens recognized this point in his dissent, noting that the cases cited by the majority "involve challenges to provisions . . . requiring developers to dedicate either a percentage of the entire parcel . . . or an equivalent value in cash . . . to help finance the construction of roads, utilities, schools, parks, and playgrounds." *Dolan* at 129 L.Ed.2d 326 (Stevens, J., dissenting).

[5] "Whenever this Court grants certiorari and vacates a court of appeals judgment in order to allow that court to reconsider its decision in the light of an intervening decision of this Court, the Court is acting on the merits." *Board Of Trustees Of Keene State College et al. v. Sweeney* 439 U.S. 24, 25-26 (1978).

requirements. Monetary exactions are the functional equivalent of dedications. Treating fees and dedications differently would create a giant loophole in the *Nollan/Dolan* doctrine. If fees were subject to a lesser degree of scrutiny, government would have the incentive and ability to demand mitigation through fees exclusively. Nothing would prevent government from exacting a fee, exercising its power of eminent domain, and using the fee revenue to pay for the acquisition or improvement. From the property owner's perspective, he or she is left in the same position as would have been the case had the original exaction been a dedication requirement.

Post-*Dolan* cases recognize this proposition and are in accord with it. In *City of Portsmouth v. Schlesinger,* 57 F.3d 12 (1st Cir. 1995), the U.S. Court of Appeals for the First Circuit suggested that Dolan's rough proportionality standard applies to impact fees that were imposed on a development project by the City of Portsmouth, New Hampshire. In *Trimen Development Company v. King County,* 877 P.2d 187, 192 (1994), the Washington Supreme Court applied *Dolan*'s heightened scrutiny to a park impact fee, holding that to be valid, an impact fee must be "required to mitigate the direct impact of the development." And in *Northern Illinois Home Builders Association, Inc. v. County of Du Page,* 649 N.E.2d 384 (1995), the Illinois Supreme Court subjected a transportation impact fee to Dolan's heightened scrutiny.

Pre-*Dolan* California cases have also suggested that dedications and fees should be evaluated similarly for takings purposes. In *Remmenga v. California Coastal Comm'n.,* 163 Cal.App.3d 623, 628 (1985), the Court of Appeal recognized the functional equivalence of fees and dedications:

> Viewing the problem as a whole, it appears that the requirement to pay an in lieu fee of $5,000 for development of one lot presents essentially the same constitutional issue as would be presented by a requirement that the owner of unimproved property adjoining tidelands dedicate public right-of-way in order to obtain a development permit.

See also, Associated Homebuilders of the Greater East Bay, Inc. v. City of Walnut Creek, 484 P.2d 606 (1971) (applying the same takings analysis to a park land dedication requirement and a park impact fee); *Grupe v. California Coastal Comm'n.,* 166 Cal.App.3d 148, 163 (1985) (discussing the proper standard for testing the validity of "all exactions").

In light of the foregoing discussion, *Blue Jeans Equities West v. City and County of San Francisco,* 221 Cal.App.3d 1072 (1992), and *Commercial Builders v. City of Sacramento,* 941 F.2d 872 (9th Cir. 1991), were overruled by *Dolan. Blue Jeans Equities,* in particular, relied on reasoning that was expressly rejected in *Dolan.* The Court of Appeal in *Blue Jeans* stated that the "High Court appears to make a distinction between regulatory takings, i.e., economic regulation, and possessory takings." *Blue Jeans Equities* at 169. However, while this position was advanced by Justice Stevens in *Dolan* ("The exactions associated with the development . . . are likewise a species of business regulation that heretofore warranted a strong presumption of constitutional validity." *Dolan, supra,* 129 L.Ed.2d at 327), it was dismissed by the majority.

D. *DOLAN* APPLIES TO LEGISLATIVE ACTIONS

1. The Limitations Of The Fifth Amendment Apply To Fees Adopted By A Legislative Action As Well As An Adjudicative Action.

The conditions in *Dolan,* like Chesterfield County's Proffer Policy, were imposed under the authority of an ordinance of general application. The City of Tigard's Comprehensive Development Code required all property owners in the Central Business District to comply with certain dedication requirements for pedestrian/bicycle pathways and

greenway/drainage space. *Dolan, supra,* 129 L. Ed. 2d at 311-313. As Justice Souter recognized:

> The majority characterizes this case as involving an "adjudicative decision' to impose permit conditions . . ., but the permit conditions were imposed pursuant to Tigard's Community Development Plan. *Dolan supra,* 129 L. Ed. 2d at 334 (Souter, J., dissenting).

Thus, the nature of the exaction involved in *Dolan* and in this case are identical on this point: each was a legislative determination applicable to all development projects.

Nollan, supra, 483 U.S. at 829 makes clear that the exaction imposed was made pursuant to a legislative act, the California Coastal Act of 1976:

> The Superior Court . . . finding, in part to avoid issues of constitutionality, "that the California Coastal Act of 1976, Cal. Pub. Res. Code Ann. @ 30000 et seq. (West 1986), authorized the Commission to impose public access conditions on coastal development permits for the replacement of an existing single-family home with a new one only where the proposed development would have an adverse impact on public access to the sea.

Unfortunately, lower courts and public agencies have misread the *Dolan* and the *Nollan* decision by seizing upon the "adjudicative decision" language used by the majority in *Dolan, supra,* 114 S.Ct. at 2316, fn. 8, as limiting the application of *Dolan and Nollan.*

Subsequent to its decision in *Dolan,* this Court has confirmed that Dolan applies to legislative acts. In *Altimus v. Oregon,* 115 S. Ct. 44, (1994), this Court vacated and remanded the case to the Court of Appeals of Oregon "for further consideration in light of *Dolan v. City of Tigard.*" *Altimus* involved a takings challenge to an exaction imposed as a condition to a project requesting a zoning change—a

legislative act. (See footnote 5, *supra.*) Similarly, Chesterfield County's Cash Proffer Policy applies to all residential rezoning requests. Cash Proffer Adopted Policy B.4.

Post-*Dolan* cases have recognized that heightened scrutiny is appropriate where an exaction is being applied to a particular project, notwithstanding whether the government approval being sought is nominally "legislative" or "adjudicative." In *J.C. Reeves Corp. v. Clackamas County,* 887 P.2d 360 (Or. 1994), the Court applied Dolan's rough proportionality standard to exactions imposed pursuant to a county-wide zoning ordinance:

> [T]he county relies on the fact that some of the improvements are required by its zoning ordinance. As we said in *Schultz v. Grants Pass* . . . however, "the character of the [condition]remains the type that is subject to the analysis in *Dolan*' . . ., whether it is legislatively required or a case-specific formulation. The nature, not the source, of the imposition is what matters. Our conclusion is not at odds with the Supreme Court's differentiation between adjudicative conditions and particular properties and generally-applicable legislative regulations. . . . A condition on the development of particular property is not converted into something other than that by reason of legislation that requires it to be imposed. *Id.* at 365, n.1 (citation omitted).

See also, Schultz v. City of Grants Pass, 884 P.2d 569 (Or. 1994) (*Dolan*'s heightened scrutiny standard applicable to city's exaction, notwithstanding the fact that the exaction was imposed pursuant to city-wide ordinance of general application).

At least one Pre-*Dolan* California decision is in accord. *See Scrutton v. County of Sacramento,* 275 Cal.App. 412 (1969) (applying *Dolan*-like scrutiny to exaction imposed on a rezone application).

2. Concern For A Heightened Risk Of Extortion Requires *Dolan's* Application to Legislatively Adopted Fees.

Some courts have distinguished *Dolan's* requirements in treating legislatively adopted fees (see e.g., *Ehrlich, supra,* 911 P.2d 429, 444) based upon this Court's statement in *Nollan,* that a local agency's exaction may amount to "out-and-out . . . extortion." *Nollan, supra,* 483 U.S. at p. 837.

However, if one were to apply this Court's principle regarding extortion, legislative actions should not be treated differently. The heightened risk of extortion, exists no less for legislatively adopted fees. The new home buyer has the least political clout to remedy extortionate fees because he or she usually resides outside of the public agency's jurisdiction at the time of the fee's adoption.

The new home buyer is not required to receive notice of a legislatively adopted fee and therefore is not able to become involved in the "political process."

> Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard."
>
> *Bi-Metallic Co. v. Colorado* 239 U.S. 441, 445 (1915).
>
> [O]nly those governmental decisions which are adjudicative in nature are subject to procedural due process principles. Legislative action is not burdened by such requirements.

Mullane v. Central Hanover Trust Co. 339 U.S. 306, 313 (1950); *see also, Horn v. County of Ventura,* 596 P.2d 1134, 1137 (1979).

Elected officials and current residents, aware of this fact, often argue in favor of the adoption of fees which pay for public facilities not entirely, or not in the least, caused by new development. Elected officials realize that since the ultimate fee payor is not currently a constituent and has not received notice, he or she is unlikely to express his or her displeasure with the fee by voting the decision maker out of office.[6] In addition, the current residents, looking out for their own interests, generally believe that it is better for new residents, rather than themselves, to pay for such facilities. As a result, the risk of extortion for legislatively imposed fees is just as high, if not higher than it is for those which are individually imposed.[7]

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[6] *See, e.g., California Building Industry Association v. Governing Board of Newhall School District,* 206 Cal.App.3d 212, 218 (1988) ("... the exactions were imposed not on an electorate which, unsurprisingly, voted overwhelmingly to approve them, but rather solely on the developers of new residential projects."); *Stubblefield Construction Co. v. City of San Bernardino,* 32 Cal.App.4th 687, 711 (1995) *cert. denied* 116 S.Ct. 300 ("It is not uncommon or unusual for a legislator to oppose a project and to use all means within his or her power to defeat it. After all, a legislator is supposed to respond to the concerns of his or her *constituents*.... Whether their concerns were proper or justified is not the issue here. The point is that their elected representative decided to oppose the project, and did so vigorously." Emphasis added.).

[7] Justice Scalia hinted at this problem:

> The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise, but rather that it permits them to be achieved "off budget," with relative invisibility and thus relative immunity from normal democratic processes.

Pennell v. City of San Jose, 485 U.S. 1, 22 (1988) (Scalia, J., concurring in part and dissenting in part).

A legislatively adopted fee may be adopted years prior to its actual imposition and on an entire city or county. Fees imposed on adjudicatory land use approvals occur closer in time to the purchase of a new home and on a geographically specific area and are therefore more likely to provide notice to the new home buyer. It seems ironic that the new home buyer should be provided greater protection from extortionate fees where he or she is more likely to receive notice than otherwise.

3. Deference To Legislative Acts Does Not Require Ignoring The Takings Clause

In part, the application of the lower scrutiny of the *Agins* standard by the Fourth Circuit may be based on the greater deference paid to a public agency's legislative, as opposed to adjudicative, actions based on the separation of powers doctrine. Yet, nowhere does this greater deference require judicial review of such a fee to ignore the Constitution.

In a recent decision, *U.S. v. Winstar Corp*, 116 U.S. 2432, 1996 U.S. LEXIS 4266 (1996) (hereinafter "*Winstar*"), this Court stated that complete deference to a legislative assessment is not appropriate when the state's self-interest is at stake. 1996 U.S. LEXIS 4266, *100, fn. 41. The Court further noted that a stricter level of scrutiny applies in such cases. *Id.* The Court characterized self-interest as an:

> [I]nstance in which the government seeks to shift the costs of meeting its legitimate public responsibilities to private parties. [Citation omitted.] The government may not "force some people alone to bear public burdens which . . . should be borne by the public as a whole."[8] *Id.*

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[8] The Court also cited *Dolan* for this proposition noting that all regulations have their costs. *Winstar, supra*, at *76-77 As this Court noted, *supra*, the exactions in *Dolan* were based on legislative enactments.

The Court's clarification was in response to the government's claim that the Sovereign Acts Doctrine applied and therefore absolute deference must be accorded to the Legislature's public and generally applicable act.[9]

Although *Winstar* applied the prohibitions of a different provision of the U.S. Constitution, i.e., the Contract Clause, this Court found that the deference generally granted to legislative determinations is not applicable where the interpretation or application of a Constitutional provision is at issue. As this Court has stated, "whether the action of [either the Legislative or Executive Branch] exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." *Nixon v. United States,* 506 U.S. 224, 238 (1993).

In applying minimum scrutiny to fees imposed on a broad class of people, the Fourth Circuit essentially said that "the frequent and widespread nature of unconstitutional acts will transform them into constitutional acts." This bizarre conclusion was commented upon by Justices Thomas and O'Connor, *supra, in Parking Association of Georgia, Inc. v. City of Atlanta, Georgia* 115 S. Ct. 2268 (1995).

This Court in *Lucas v. South Carolina Coastal Commission,* 505 U.S. 1003 (1992), confirmed that the formalistic

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[9] The government in *Winstar* argued that a standard almost identical to the Agins test should be applied to the public and general act of the legislature, i.e., whether the act "advance[s] the general welfare." *Winstar Corp., supra,* at *93-94. The Fourth Circuit suggested that the test for legislative actions such as Chesterfield County's should be whether they substantially advance a legitimate governmental purpose (the *Agins* test). As this Court rejected the test proffered by the government in *Winstar,* so should it reverse the Fourth Circuit's deferential standard applied to legislatively enacted fees.

distinction between a regulation adopted by a legislative action or an adjudicative action is irrelevant:

> Justice Stevens would "look to the generality of a regulation of property" to determine whether compensation is owing. [Cit. om.] The Beachfront Management Act is general, in his view, because it "regulates the use of the coastline of the entire state."... But a regulation specifically directed to land use no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquired immunity by prohibiting all religions. Justice Stevens approach renders the Takings Clause little more than a particularized restatement of the Equal Protection Clause.
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> *Lucas v. South Carolina Coastal Commission,* 505 U.S. 1003, 1027, fn. 14.

E. THIS COURT SHOULD GRANT *CERTIORARI* TO PROVIDE THE SAME PROTECTION TO PROPERTY AS IS GIVEN TO FREE SPEECH AND PRIVACY.

In *Dolan v. City of* Tigard, 129 L.Ed 2d 304, 321 (1994), this court stated that "[w]e see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, Should be relegated to the status of a poor relation in these comparable circumstances." Yet thus far, courts, including the Fourth Circuit, have been reluctant to apply such a standard to the regulation of property. This Court's statement was not dependent upon whether the regulation was challenged on its face or as-applied, whether it was legislatively or adjudicatively imposed, or whether it required a monetary or possessory interest.

The cases which this Court relied upon in *Dolan* held that 1) the government action, i.e., warrantless searches, are generally unreasonable (*Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311-313 (1978)) and 2) the regulation must directly advance the governmental interest asserted and it must not be more burdensome than is necessary to serve that interest (*Central Hudson Gas & Electric Corp. v. Public Service Commission Of New York*, 447 U.S. 557, 561-566 (1980)).

Applying such a rule to the case at bar would require the rebuttable presumption that Chesterfield County's Cash Proffer Policy is unreasonable. Furthermore, the Policy must directly advance the governmental interest of providing public facilities that are required as a result of new development. It is doubtful whether this requirement can be satisfied because Chesterfield County may use the money as a slush fund for 15 years. If not used for its intended purposes by that time it is returned without interest. It is in essence an interest free loan to Chesterfield County. Finally, it is clearly more burdensome on the property owner than is necessary. Such is the case because it fails to consider the use of other funds to pay for such facilities and it assumes that existing residential development as well as new commercial development does not contribute to increased demand for public facilities. Such conditions fail to meet *Dolan's* rough proportionality standard, much less, the standard articulated in *Central Hudson*.

CONCLUSION

Therefore, for the reasons stated above and in the Brief for Petitioners, the BILD Foundation prays that this Court grant certiorari to resolve these important questions of law currently conflicting the lower courts.

Respectfully submitted,

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